Supreme Court, U.S.
FILED

961304 FEB 5 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KAREN KARCHER,
Petitioner,

v.

EMERSON ELECTRIC CO.,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JEROME J. DOBSON*
WEINHAUS AND DOBSON
906 Olive Street
Suite 900
St. Louis, Missouri 63101
(314) 621-8363

JOHN D. LYNN
DENNER & LYNN, L.L.C.
393 North Euclid Avenue
Suite 220
St. Louis, Missouri 63108
(314) 367-5575

Attorneys for Petitioner Karcher

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

39 pp

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that an employer's intentional discrimination and intentional retaliation are insufficient, without some additional showing, to show "malice or reckless indifference to federally protected rights" so as to support an award of punitive damages under Title VII?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdictional Statement	1
Statute Involved	1
Statement of the Case	1
Reasons for Granting the Petition for Certiorari	6
Conclusion	17
Appendix:	
Opinion of the United States Court of Appeals for the Eighth Circuit dated September 4, 1996	A-1
Order of the United States Court of Appeals for the Eighth Circuit dated November 13, 1996	A-15

TABLE OF AUTHORITIES

Page(s)

Cases:

Barbour v. Merrill, 48 F.3d 1279 (D.C.Cir. 1995) 8-9,11

Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994) 13-14

Beauford v. Sisters of Mercy-Province of Detroit, 816 F.2d 1104 (6th Cir. 1987) 8

Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983)..... 8,12

BMW of N.A., Inc. v. Gore, 116 S.Ct. 1589 (1996)..... 10

Emmel v. Coca-Cola Bottling Co., 95 F.3d 627 (7th Cir. 1996)..... 13

Farpella-Crosby v. Horizon Health Care, 97 F.3d 803 (5th Cir. 1996) 14

Gen. Building Contractors Assn. v. Penn., 458 U.S. 375 (1982) 10

Grayned v. City of Rockford, 408 U.S. 104 (1972) 14

Hazen Paper Co. v. Biggins, 113 S.Ct. 1701 (1993)..... 16

Jones v. Western Geophysical Co., 761 F.2d 1158 (5th Cir. 1985) 8

Massachusetts Trustees v. United States, 377 U.S. 235 (1965) 17

Merrill v. Barbour, 64 U.S.L.W. 3500 (Jan. 19, 1996)..... 8

Merriweather v. Family Dollar Stores, 1996 WL 738715 (7th Cir. 1996) 9-11,16

Ortiz v. John O. Butler Co., 94 F.3d 1121 (7th Cir. 1996) 13

Pandazides v. Vir. Bd. of Educ., 13 F.3d 823 (4th Cir. 1994) 9

Patterson v. McLean Credit Union, 491 U.S. 16 (1989) 11

Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996) 7,14

Rowlett v. Anheuser-Busch, 832 F.2d 194 (1st Cir. 1987) 8

Smith v. Wade, 416 U.S. 30 (1983) 8-10,12, 14,16-17

Splunge v. Shoney's, Inc., 97 F.3d 488 (11th Cir. 1996) 9,13

Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996) 9,14

U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) 13

Varner v. National Super Markets, Inc., 94 F.3d 1209 (8th Cir. 1996) 9,14

Statutes:

Title VII of the Civil Rights Act of 1964 ..... *passim*

42 U.S.C. §1981 ..... *passim*

42 U.S.C. §1983 9-10

Legislative History:

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess (1991) 7,10

H.R. Rep. No. 102-40 (II), 102d Cong., 1st Sess. (1991) 6,10

Rep. Edwards' Interpretative Memorandum, 137 Cong. Rec. (daily ed. Nov. 7, 1991) 7,15

Other Authorities:

EEOC Policy Guide on Compensatory and Punitive Damages, EEOC Comp. Man. (BNA), 405:7091 (July 7, 1992) 7,11,16

Johnson, *A Standard for Punitive Damages Under Title VII,* 46 Fla. L. Rev. 521 (1995) 11,16

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on September 4, 1996, is officially reported at 94 F.3d 502 (8th Cir. 1996). A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on September 4, 1996. Plaintiff Karcher filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The Court of Appeals denied the petition on November 13, 1996. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 102 of the Civil Rights Act of 1991 amended 42 U.S.C. §1981 as follows:

> A complaining party may recover punitive damages under [Title VII of the Civil Rights Act of 1964] against a respondent. . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

See 42 U.S.C. §1981a(b)(1).

STATEMENT OF THE CASE

The Petitioner, plaintiff Karen Karcher, worked as a machinist for the Respondent, defendant Emerson Electric Company, for close to twenty years. Since July 1978 she worked in the machine shop of its Alco Controls division, which makes refrigerator parts.

There are two types of hourly employees in the machine shop: set up workers, who calibrate or "set up" the machinery that is used in making parts, and operators, who run the machines once they are set up to actually produce the parts. The set up jobs are considered more highly skilled and pay more than the operator jobs. Ms. Karcher was an operator.

In 1988, Emerson began purchasing new, computerized machinery for use in the Alco division. While the old machinery was set up manually, the new machines were set up by computer. The company classified this skilled position as the "Group 6 set up position" which was responsible for performing the set up work on the new equipment. Like the manual set up positions, the Group 6 set up positions were classified higher and paid more than the operator positions.

Between 1988 and 1994, the company promoted 26 hourly employees into Group 6 set up positions. Although at least one third of the hourly work force in the division was female and women applied for the promotions, all 26 of the employees selected for promotion were males.

Ms. Karcher was one of the women who was rejected for promotion. On numerous occasions she competed for open Group 6 set up positions. Each time she was passed over in favor of a male employee.

The company contended that experience setting up the old manual machines was a prerequisite for promotion to a Group 6 set up position. This alleged criteria, however, had little to do with selecting qualified candidates and more to do with reserving the higher paying set up positions for male employees. For one thing, setting up the new computerized machines was substantially different, and the skills used in setting up the old manual machines were not transferable to it. Indeed, the men who were promoted to the Group 6 set up positions were given three weeks of full time training on the new machines, regardless of their previous experience. In addition, at the time Emerson

claims to have established the prerequisite of prior set up experience, no women had ever held manual set up jobs in the Alco division. The company knew that making manual set up experience a prerequisite would effectively bar women from the new positions. Moreover, in the six years *after* the prerequisite was established - up to the trial of this lawsuit — the company continued to exclude women from manual set up jobs, so none could become "eligible" for a Group 6 set up promotion. Finally, the company *ignored* its alleged selection criteria when doing so benefitted males. One man who had no prior set up experience was promoted, while a woman who had eleven years of set up experience at another company was passed over in favor of another man.

Ms. Karcher protested the company's failure to promote her by filing a Charge of Discrimination with the EEOC, by filing a grievance with her union, and by attempting to meet with the division president. Emerson responded to her protests of the discrimination by committing two separate acts of retaliation against her.

First, the company struck at Ms. Karcher by forcing her husband, who also worked in the Alco division, to leave his job. Jerry Karcher's supervisors called him into a meeting and told him that "since your wife has these lawsuits and cases pending against us, we feel that we are going to give you sixty days to find another job." The company generated two written memoranda which reflected its retaliatory motivation. A month later the supervisors again threatened his job. Jerry Karcher found other employment and resigned.

Next, the company attacked Ms. Karcher directly. When Ms. Karcher signed up for a company-sponsored bingo game which her supervisor told her was mandatory, the company claimed, falsely, that she was ineligible to participate and charged her with "falsifying company documents". Company officials called Ms. Karcher into a meeting over this alleged infraction, threatened to

fire her, made her wait a week to learn her fate, and finally issued her a written "Last and Final Warning". A male employee — who did not have outstanding charges of discrimination against the company — also participated in the bingo game despite his ineligibility. The company did not discipline him at all.

Ms. Karcher filed this lawsuit alleging sex discrimination and retaliation in violation of Title VII and the analogous Missouri Human Rights Act. A jury found that the company intentionally discriminated against Ms. Karcher on account of her sex when it denied her promotion to the Group 6 set up positions, and that it intentionally retaliated against her for protesting the sex discrimination by forcing her husband out of the company and by disciplining her in connection with the bingo game. The jury awarded Ms. Karcher $25,000 in lost wages and benefits and $150,000 in compensation for her emotional distress. It also determined that the defendant company's two acts of intentional sex discrimination and two acts of intentional retaliation warranted an assessment of $350,000 in punitive damages.

The Eighth Circuit Court of Appeals upheld the jury verdict in Ms. Karcher's favor but set aside the punitive damage award. The Court held that the evidence was sufficient to prove that the company intentionally discriminated against Ms. Karcher through its "*deliberate* choice to set qualifications which would effectively eliminate all women from obtaining Group 6 set up positions", Appendix at A-12 (emphasis added), by applying the qualifications criteria inconsistently to benefit males, Appendix at A-4 and A-9, and by denying women the opportunity to obtain the allegedly necessary qualifications, Appendix at A-9. The Court further found the evidence sufficient to establish that Emerson committed two separate acts of intentional retaliation against Ms. Karcher for protesting the discrimination. Appendix at A-9 - A-11. Nevertheless, the Court concluded that "there was simply insufficient evidence that Emerson acted 'with malice or reckless indifference to [Karcher's] federally protected rights',

as required under Title VII". Appendix at A-12. The Court did not explain what additional evidence Ms. Karcher should have presented to support the punitive damage award.

The basis for federal jurisdiction in the trial court was 28 U.S.C. §1331, 28 U.S.C. §1343 and 28 U.S.C. §1367.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The Eighth Circuit held that employees who successfully prove that their employers intentionally discriminated against them, and intentionally retaliated against them for opposing the discrimination, cannot recover punitive damages under Title VII unless they make some unspecified "extra showing". Because this holding raises an important issue concerning the proper interpretation of the Civil Rights Act of 1991 which will impact on almost all Title VII cases, and because it conflicts with several federal appellate court decisions as well as a decision of this Court, this Court should grant Plaintiff Karcher's petition for certiorari to review it.

Congress decided in the Civil Rights Act of 1991 that employers should be liable for punitive damages under Title VII if they act "with malice or with reckless indifference to the federally protected rights" of their employees. 42 U.S.C. §1981a(b)(1). The text, purpose and legislative history of the Act make clear that Congress wanted punitive damages under Title VII to be determined under the same legal standards that apply under 42 U.S.C. §1981. Congress amended Section 1981, rather than Title VII itself, to authorize such damages. *Id.* Its purpose was to ensure that victims of the kinds of intentional discrimination covered by Title VII, such as sex discrimination, would be able to recover punitive damages on the same basis as victims of race discrimination under Section 1981. H.R. Rep. No. 102-40 (II), 102d Cong., 1st Sess. 24-29 (1991). The legislative history of the Act leaves no doubt that Congress wanted the courts to look to federal caselaw decided under Section 1981 to determine the legal standards for punitive damages under Title VII:

> Punitive damages would also be available where the respondent. . . engaged in an unlawful employment practice with malice, or reckless or callous indifference to the

> federally protected rights of others. This language sets the same standard courts have applied under Section 1981.

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. 74 (1991) (citations of federal appellate court decisions omitted). In addition:

> Punitive damages are available under [Title VII] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. §1981. No higher standard may be imposed.

Rep. Edwards' Interpretative Memorandum, 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991).

The federal courts which have addressed the question, as well as the Equal Employment Opportunity Commission (EEOC), have agreed that the goal of Congress was to unify the law under Title VII and Section 1981 with respect to punitive damages. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 941 (5th Cir. 1996); EEOC Policy Guide on Compensatory and Punitive Damages, EEOC Comp. Man. (BNA), 405:7091, 7099 (July 7, 1992).

All this is clear and incontestable. The problem is that the federal courts of appeal are sharply divided over whether punitive damages can be awarded under Section 1981 with no additional evidence beyond that adduced for liability. On the one hand, the Fifth and Sixth Circuits have taken the position that some "extra showing" beyond intentional discrimination is necessary. According to the Sixth Circuit:

> After scrutinizing the record, this court concludes that, while the plaintiff presented sufficient evidence to submit to the jury the issue of intentional discrimination. . . no testimony was adduced evidencing the requisite malice or reckless or callous indifference of an egregious character

> on the part of either defendant as to support a jury verdict imposing punitive damages.

Beauford v. Sisters of Mercy-Province of Detroit, 816 F.2d 1104, 1109 (6th Cir. 1987); *see also Jones v. Western Geophysical Co.*, 761 F.2d 1158, 1162 (5th Cir. 1985). On the other hand, the First, Eighth and D.C. Circuits have taken the exact opposite position. They have concluded that intentional discrimination, by its very nature, is malicious and warrants an award of punitive damages without any "extra showing". According to the First Circuit:

> Can it really be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?

Rowlett v. Anheuser-Busch, 832 F.2d 194, 205-06 (1st Cir. 1987). According to the D.C. Circuit:

> An employee's right to employment free from racial discrimination is one of the most widely recognized and protected civil rights. As the Supreme Court has explained, evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages, provided the jury in its "discretionary moral judgment", *Smith v. Wade*, 461 U.S. at 52, finds that the conduct merits a punitive award. (citations omitted). No additional evidence is required.

Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C.Cir. 1995); *see also Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1246-47 (8th Cir. 1983).

The conflict in the Circuits did not escape this Court's attention. A year ago, it granted certiorari in the *Barbour* case to answer the question whether the standard for punitive damages is the same -- or higher -- than the standard for liability in Section 1981 cases. *Merrill v. Barbour*, 64 U.S.L.W. 3500 (Jan. 19, 1996). Although the Court dismissed the case a little over a

month later, because the parties settled it, the fact that it granted certiorari in the first place shows that the question is an important one worthy of its review. *Id.* at 3593 (Feb. 28, 1996).

The disagreement among the federal courts of appeal, once confined to Section 1981, has predictably expanded to Title VII. Several appellate courts, in particular the Fourth, Sixth, Eighth and Eleventh Circuits, have expressly or implicitly held that intentional discrimination is an insufficiently culpable state of mind for punitive damages under Title VII. According to these courts, "additional evidence" is necessary. *See, e.g., Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996); *Pandazides v. Vir. Bd. of Educ.*, 13 F.3d 823, 830 n. 9 (4th Cir. 1994). Going the other way, however, is the Seventh Circuit which recently held in a retaliation case that an employer who intentionally violates Title VII can be held liable for punitive damages without the need for any "additional evidence". *Merriweather v. Family Dollar Stores*, 1996 WL 738715 at 8-9 (7th Cir. Dec. 26, 1996). In reaching this conclusion, the Court relied heavily on the D.C. Circuit's decision in *Barbour*, quoting it for the proposition that "evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the factfinder to award punitive damages. . . No additional evidence of reckless indifference is needed." *Id.* at 8-9.

The Seventh Circuit in *Merriweather* also relied heavily on this Court's decision in *Smith v. Wade*, 416 U.S. 30 (1983), a case brought under 42 U.S.C. §1983. In *Smith*, the Court rejected the argument that "the threshold for punitive damages should always be higher than that for liability in the first instance". *Id.* at 38. It held that an intentional violation of Section 1983 suffices, without any additional showing, to justify a punitive damage award:

> Reckless or callous disregard for the plaintiff's rights, *as well as intentional violations of federal law*, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages.

Id. at 51 (emphasis added). The Seventh Circuit correctly held that the same rule applies under Section 1981 since, as this Court has explained, Section 1981 and Section 1983 are "legislative cousins" and must be construed in harmony with each other. *Gen. Building Contractors Assn. v. Penn.*, 458 U.S. 375, 389-90 (1982). Moreover, the Seventh Circuit correctly held that the same rule applies under Title VII:

> *Smith v. Wade* was decided under 42 U.S.C. §1983. We have previously recognized that its rationale applies equally to cases under §1981. . . It is similarly applicable to Title VII, since the Civil Rights Act of 1991, which made punitive damages available in Title VII, tracks the language of *Smith v. Wade*.

Merriweather, 1996 WL 738715 at 11 n. 2. The legislative history of the Civil Rights Act of 1991 confirms this conclusion. The House Reports cite *Smith v. Wade* — not once but twice — as setting forth the proper standard for punitive damages under Title VII. H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. 74 (1991); H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. 29 (1991).[1]

[1] As the Seventh Circuit recognized, a jury which finds intentional discrimination or retaliation *may* assess punitive damages, but it is not *required* to assess them. Thus, punitive damages are not automatic in every case. The jury must still make a "discretionary moral judgment" whether such damages are warranted in light of all the circumstances of the case. *Id.* at 9, citing *Smith v. Wade*. Once it elects to award punitive damages, however, its decision is immune from further judicial review. The finding of intentional discrimination or retaliation is sufficient, without more, to support it. This does not mean, of course, that the *amount* of punitive damages is immune from judicial review. The amount is reviewable under traditional legal standards. *BMW of N.A., Inc. v. Gore*, 116 S.Ct. 1589, 1598-99 (1996).

The Seventh Circuit's holding in *Merriweather* that the standard for punitive damages in Title VII cases is the same as the underlying standard for liability, following the reasoning of the D.C. Circuit in *Barbour*, is commendable in terms of logic, fairness and common sense. Courts, administrative agencies, and commentators agree that intentional discrimination is reprehensible, in and of itself, and that punitive damages are warranted to punish it and deter its repetition. As this Court has pointed out, it is a "profound wrong of tragic dimensions". *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). The EEOC has declared that "conscious, purposeful discrimination may be sufficient to warrant punitive damages", EEOC Policy Guide, supra, at 405:7100, and a commentator has observed:

> A court which determines that the defendant intentionally discriminated is simply wrong to find that the facts are insufficient to support an award of punitive damages. The award of punitive damages should be presumptively appropriate in all cases in which the defendant intentionally discriminated. The defendant has acted "maliciously", with "ill will", "recklessly", "purposefully", "callously", "willfully" and "outrageously" in intentionally treating the plaintiff differently because of her race, sex, religion, color, or national origin.

Johnson, *A Standard for Punitive Damages Under Title VII*, 46 Fla. L. Rev. 521, 561 (1995).

It is hard to believe that Congress, which enacted the Civil Rights Act of 1991 to expand the rights and remedies of victims of intentional discrimination, did not share these sentiments. Indeed, it expressly authorized punitive damages against employers who are merely reckless, as opposed to malicious, in bringing about discrimination. 42 U.S.C. §1981a(b)(1). An employer would be reckless, for example, if it had good reason to believe that a woman was being sexually harassed by a male

co-worker in its workplace but failed to take effective remedial steps to stop it. Recklessness, of course, requires a less culpable state of mind than specific intent to discriminate. If reckless conduct is sufficient to subject an employer to punitive damages under Title VII, then intentional conduct must be sufficient also. It would not make any sense to hold an employer liable for punitive damages when it recklessly allows a woman to be sexually harassed but not when it willfully discriminates against that woman by, for example, denying her promotions because of her sex.

The reasoning of those federal courts of appeal which have adopted the "additional evidence" standard for punitive damages has been shallow or non-existent. The Eighth Circuit's decision in the present case is a good example. The Court did not analyze the text, purpose or legislative history of the punitive damage provision of the Civil Rights Act of 1991 or this Court's decision in *Smith v. Wade*. Instead, it simply assumed, without any analysis, that a "showing of more than intentional discrimination is required to recover punitive damages" under Title VII. Appendix at A-13. Like other federal courts of appeal, the Eighth Circuit seemed unaware or uninterested in the fact that Congress wanted the standard for punitive damages under Title VII to mirror the standard for punitive damages under Section 1981. Had it recognized this fact, it would have reached a completely different result. It would have affirmed, rather than reversed, the punitive damage award because it had previously ruled in another case that intentional discrimination is sufficient, *without more*, to sustain an award of punitive damages under Section 1981. *Block*, 712 F.2d at 1247-48, relying on *Smith v. Wade*.[2]

---

[2] As things stand now in the Eighth Circuit, intentional discrimination is enough to justify punitive damages under Section 1981 but not enough to justify punitive damages under Title VII. This anomaly is intolerable. Congress wanted the same standard to apply under both statutes.

Although these federal appellate courts have insisted upon some extra showing beyond purposeful discrimination before they will uphold a punitive damage award, they have been unable to define what this extra showing might be. This is not surprising, since the operative state of mind for disparate treatment, which is intent to discriminate, is the most culpable state of mind possible under Title VII. *No extra showing is possible.* To require the plaintiff in an employment discrimination case to prove more than purposeful discrimination is to require the impossible. As a result of their failure to come to grips with this reality, the lower federal courts have rendered a series of decisions which are incoherent, confusing and inconsistent.

The disarray in the Circuits is striking. One court has suggested that intentional discrimination, once proved, must be "egregious" before punitive damages can be awarded. However, it did not explain why intentional discrimination is not itself egregious. *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1126 (7th Cir. 1996). Another court has suggested that it is not enough that the intentional discrimination is egregious; it must be "sufficiently egregious". However, it did not explain what this means. *Beardsley v. Webb*, 30 F.3d 524, 531 (4th Cir. 1994). According to one court, the plaintiff must prove the intentional discrimination with direct, as opposed to circumstantial, evidence before punitive damages can be recovered. *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 637 (7th Cir. 1996). Apparently this court believes that employers can intentionally discriminate against women and other protected groups, and avoid liability for punitive damages, as long as they are not too obvious about it. However, this Court has ruled that direct and circumstantial evidence are equally valid and probative in employment discrimination cases. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3 (1983). Yet another court, citing a district court decision, has defined "malice" as actual intent to harm, *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996),

even though this Court rejected such a definition as overly strict in *Smith v. Wade*, 461 U.S. at 37 n.6, 39 n.8.

Most courts have not even tried to articulate a standard or principle to define what additional evidence is necessary to justify a punitive damage award under Title VII. Many have engaged in a freestyle impressionistic review of the facts in the case, arbitrarily and haphazardly selecting certain facts as important and rejecting others as unimportant. *Patterson*, 90 F.3d at 943; *Beardsley*, 30 F.3d at 531; *Turic*, 85 F.3d at 1216. Others, such as the Eighth Circuit in this case, have not bothered to discuss the facts at all. They have simply asserted, in a conclusory fashion, that the plaintiff failed to satisfy the additional evidence requirement. *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809-10 (5th Cir. 1996); *Varner*, 94 F.3d at 1214.

These cases make clear that the lower federal courts are in dire need of authoritative guidance from this Court in order to restore order and coherence to the law. The legal test they have been employing — that the plaintiff must make some "extra showing" beyond intentional discrimination to recover punitive damages — is hopelessly vague and infinitely manipulable. Nobody knows what it means. There is no meaningful content to the test, and it is doubtful that any meaningful content can be given to it. Its formlessness confers on appellate court judges the kind of standardless discretion which inevitably leads to resolution of cases "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application". *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The current state of affairs threatens to deliver lottery-like outcomes in employment discrimination cases with punitive damages being approved or disapproved on appeal depending, not on fixed and ascertainable legal standards, but on the personal values and predilections of individual appellate court judges. Even if this Court believes that some "extra showing" is required under Title VII, it should grant certiorari in this case to clarify exactly what

"extra showing" is required. Without such guidance, punitive damage awards will continue to be subjected to a case-by-case, panel-by-panel evaluation with appellate judges free to substitute their opinion for that of the jury.

Such a result frustrates the will of Congress. Congress wanted juries — not judges — to decide whether punitive damages are appropriate in Title VII cases. 42 U.S.C. §1981a(c). Representative Edwards, co-sponsor of HR-1 (House Bill) and Chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee which was responsible for HR-1, made this clear when he stated:

> The sponsors recognize the limited role of the judiciary in reviewing jury awards and intend that only this well-established supervisory role be applied to the review of jury awards under [Title VII]. This legislation in no way suggests or authorizes any new or additional judicial authority in this area.

Rep. Edwards' Interpretative Memorandum, supra, 137 Cong. Rec. at H9527. The Eighth Circuit's decision in this case is a disturbing, yet increasingly common, example of excessive judicial activism in the review of punitive damage awards in Title VII cases. Although the Court found there was sufficient evidence to support the jury's findings that Defendant intentionally discriminated and then retaliated against Plaintiff Karcher, it went on to conclude, without analysis, that the same evidence was "simply insufficient" to show any malice or reckless indifference on the part of Defendant. Appendix at A-12. Left unexplained was how Defendant could have deliberately discriminated against Plaintiff, as well as deliberately retaliated against her, without malice or reckless indifference to her rights under Title VII. The Eighth Circuit did not even try to untie this knot in logic.

A final point. One commentator has suggested that there might be a narrow category of cases in which employers inten-

tionally treat their employees differently on the basis of a prohibited criterion but nevertheless reasonably believe in good faith, albeit mistakenly, that they are not violating Title VII. In such cases, the argument runs, the employers should not be liable for punitive damages. Johnson, supra, 46 Fla. L. Rev. at 553-61; *cf. Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1709 (1993). Whatever the merit of such an argument, it has no application to the facts of this case. Defendant repeatedly refused to promote Plaintiff Karcher to the Group 6 set up position because of her sex and, in addition, systematically excluded other women from this position. Moreover, it intentionally retaliated against Ms. Karcher in multiple ways because she challenged its unlawful conduct. Defendant cannot argue, without blushing, that it engaged in such conduct in the mistaken but good faith belief that it did not violate Title VII. Such a contention would be utterly untenable. Retaliation in particular is the sort of nefarious motivation, or evil state of mind, which an award of punitive damages is designed to punish and deter. It is malum in se. Indeed, retaliation satisfies the strictest standard for punitive damages — actual malicious intent — because it shows ill will, spite and intent to injure. *Smith v. Wade*, 461 U.S. at 37. As the EEOC has pointed out, "proof of threats or deliberate retaliatory action against complaining parties for complaints to management or filing a charge normally will constitute malice" and thus warrant an award of punitive damages. EEOC Policy Guidance, supra, at 405:7101.[3]

---

[3] The present case, unlike the Seventh Circuit's recent decision in *Merriweather*, involves claims of both (1) disparate treatment and (2) retaliation. Because of the diversity of claims in this case, it is an especially attractive candidate for review by this Court. It offers the Court the opportunity to explore the parameters of a punitive damages standard in the context of the two most common claims under Title VII: (1) disparate treatment and (2) retaliation.

CONCLUSION

The Eighth Circuit viewed the evidence in this case through the lens of the wrong legal standard. It incorrectly ruled that "something more" than intentional discrimination and intentional retaliation was necessary to justify the jury's award of punitive damages. This ruling contradicts the intent of Congress and will undermine the deterrent purposes of Title VII in countless pending and future cases in the lower federal courts. It also conflicts with several federal appellate court decisions and this Court's own decision in *Smith v. Wade*. For these reasons, Plaintiff Karcher asks the Court to grant her petition for certiorari to review it. *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965) (certiorari granted because of a conflict among the Circuits and the fact that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues").

Respectfully submitted,

WEINHAUS AND DOBSON

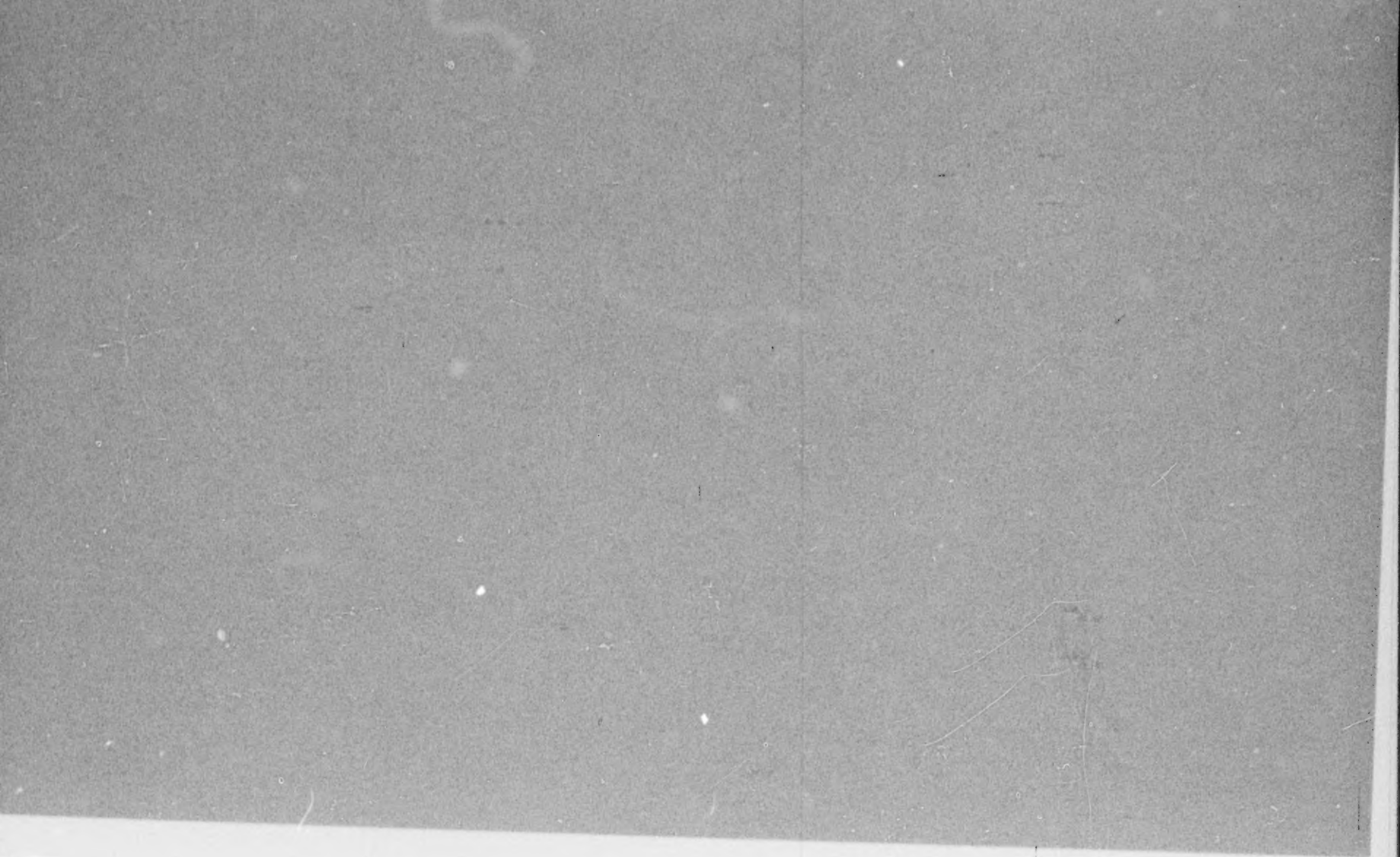
Jerome J. Dobson
906 Olive Street
Suite 900
St. Louis, Missouri 63101
(314) 621-8363

DENNER & LYNN, L.L.C.

John D. Lynn
393 N. Euclid Avenue
Suite 220
St. Louis, MO 63108
(314) 367-5575

Attorneys for Petitioner

APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3427

Karen M. Karcher,
Appellee,

v.

Emerson Electric Co.,
Appellant

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: May 16, 1996

Filed: September 4, 1996

Before BOWMAN, HEANEY, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Emerson Electric Company (Emerson) appeals the jury verdict in favor of Karen Karcher on her sex and handicap discrimination claims. On appeal, Emerson raises numerous issues relating to the trial, including: 1) that it was entitled to judgment as a matter of law (JAML) on Karcher's failure-to-promote and retaliation claims; 2) that the district court erred in failing to alter or amend the judgment with respect to emotional distress damages and punitive damages; and 3) that it is entitled to a new trial because of erroneous evidentiary rulings and erroneous jury instructions. We affirm in part and reverse in part.

I.

At the time of trial, Karcher was an employee of Alco Controls (Alco), a division of Emerson. Karcher worked at Alco's St.

Louis facility, which manufactures refrigerator parts. The St. Louis plant employs more than three hundred hourly workers, who are represented by District No. 9, International Association of Machinists, AFL-CIO (the union). At least one-third of the union employees are female.

Until 1988, there were only three basic types of equipment in the machine shop, the area of the plant where Karcher worked: manual bar feed machines, manual automatic chucker machines, and numerically-controlled machines. The machine shop used two types of employees, set-up workers and operators. The set-up workers manually calibrated the machines to manufacture a particular refrigerator part and were then responsible for maintaining the machine so that it would produce consistently accurate parts. After the machine was set up, the operators ran the machines by feeding the raw materials into the machine, inspecting the completed parts to determine if they met specifications, and making minor adjustments to the machine, if necessary.

In 1988, Emerson purchased two new computerized bar feed machines called Miyanos and two new computerized automatic chucker machines called Pumas. Rather than requiring manual setup as the old machines did, these machines were set up by computer. Thus, where the adjustments in the tooling had previously been made by hand, the set-up person could now make these adjustments by simply pushing buttons on a computer.

Because no plant employee knew how to program or set up the new machines, Emerson initially hired someone outside the company to perform these tasks and to teach these skills to selected male Emerson employees. After Emerson installed the new machines, union and company officials met to negotiate a job classification, wage rate, and selection process for the new set-up jobs. Although the parties dispute the results of this meeting, they agree that the new jobs were classified as "Group 6 general machine shop set-up" (Group 6 set-up positions).

This classification required the employee holding the position to be able to set up any machine in the plant. No Emerson employee was capable of doing this, however, so the parties were required to further negotiate the qualifications for the job. The collective bargaining agreement in place at the time provided that new jobs should be filled "with seniority being the deciding factor, where skill, ability, and physical fitness of the employees' [sic] being considered are relatively equal." This rule could not be applied in a straightforward manner to the Group 6 set-up positions, however, because no employee had direct experience setting up the machines, and the parties disputed what indirect experience would be helpful in undertaking these new jobs.

Both Karcher and Emerson offered the testimony of witnesses who were present at this initial union-employer meeting. One of Karcher's witnesses, Grady Scott (Karcher's step-father), testified that it was his understanding that the new positions would be awarded based solely on seniority. Another of Karcher's witnesses, Tom Bonzo, testified that the positions were to be awarded to the senior bidder with at least six months experience in a machine shop. On the other hand, two of Emerson's witnesses testified that Miyano setup would require prior set-up experience on bar feed equipment and that Puma setup would require prior set-up experience on automatic chuckers. Emerson's witnesses also agreed that workers with prior set-up experience on the old numerically-controlled machines would be qualified to set up both Pumas and Miyanos. According to these witnesses, the senior bidder with the appropriate set-up experience would be awarded the job.

Karcher was hired by Emerson on March 19, 1976. From the time she was hired until the time of trial, she held a variety of jobs at Emerson, including assembler, manual automatic chucker machine operator, drill press operator, bench lathe operator, welder, and tester. Her experience included operating numerically controlled machines and inspecting and finishing parts that

had been machined. None of these jobs, however, involved set-up work.

On September 11, 1978, Karcher became the only woman to work in the automatic screw machine department. Although this position was not primarily a set-up position, she began learning some set-up skills on an automatic screw machine while she held this job. On October 23, 1978, she was removed from this job even though she was having no difficulty learning setup on the screw machine.

Karcher applied for two Group 6 set-up positions, one that was posted on October 18, 1990, and another that was posted on February 4, 1992. Karcher was near the top of seniority on the list of applicants for both of these positions. Ten Emerson employees, including Karcher, bid on the first position, with Karcher being the second most senior bidder. Both the most senior bidder and Karcher, as well as the next two senior bidders, were determined to be "not qualified" for the position. Bill Pearson, the fifth senior bidder got the job. Pearson had bar feed set-up experience on the turret lathe as well as trade schooling. The fourth senior bidder, Anna Ryan, was determined to be not qualified despite her set-up experience with another company. Karcher filed charges with the EEOC and the Missouri Commission on Human Rights with respect to the denial of this promotion. Nine employees, including Karcher, bid on the second job. The senior bidder, after being determined to be not qualified, withdrew his bid. Karcher, the next senior, was again determined to be not qualified. A male employee was given the job.

Between 1988 and 1994, Emerson awarded twenty-six Miyano and Puma set-up positions. All of these positions were awarded to men. Twenty-five of the successful bidders had either set-up experience or experience on the numerically-controlled machines. Grady Scott, however, was awarded a Group 6 set-up

position without having either type of experience.[1] Scott testified that Karcher was more qualified than he was because she had operated numerous machines and equipment.

Karcher's husband, Jerry Karcher (Jerry) was also an Emerson employee, working as a quality assurance supervisor. As part of his job, Jerry was required to attend monthly supervisor's meetings. At these meetings, status reports were presented regarding pending workers' compensation claims and grievances. During the time he held this job, his wife filed at least six workers' compensation claims after being injured on the job in March of 1983. Thus, as part of his job, Jerry attended meetings where his wife's claims were discussed.

In early 1990, Karcher applied for a position in the quality assurance department. Had she been awarded the job, her husband would have been her direct supervisor. At that time, Jerry told his supervisors that were his wife to be awarded the job, he would leave the company to avoid any conflict of interest. When Karcher was informed that her husband would be required to leave the company if she were awarded the job, she withdrew her bid.

In early December of 1991, Karcher learned that another Group 6 set-up position would become available because Scott would be retiring because of ill health. Karcher then attempted to contact Richard Schul, Alco's president, about the potential job opening. Schul refused to see Karcher, informing her that she needed to discuss the matter through the company's chain of command. In response to Karcher's attempt to contact Schul, Jerry's supervisors, Vicki Taylor and Jim Wors, met with him on December 9, 1991, and informed him that they believed that a serious conflict of interest had developed and that he should begin looking for another job. According to Jerry, Wors stated at

---

[1] Emerson asserted that Scott had set-up experience acquired in the repair shop that he owned. Scott, himself, testified that he had no such experience.

this time that "since your wife has these lawsuits and cases pending against us, we feel that we are going to give you sixty days to find another job."

Although Jerry did not find another job within sixty days, he was not terminated. He continued to work for Emerson until July 1992, when he was offered a job at Cerro Copper Product Company. He accepted this position, which offered a higher salary but fewer benefits.

In January 1994, Emerson instituted a "safety pays" bingo game. The bingo jackpot started at twenty-five dollars and increased one dollar for every day in which there was not a lost-time accident in the plant. Each employee who signed up for the game received a bingo sheet, and each day without a lost-time accident a number and letter were drawn in the typical bingo manner. Any employee who had a lost-time accident on the job was disqualified from playing the remainder of the game and the following round. The bingo sign-in sheet stated, "By signing my name below, I certify I have not had any work-related injuries during the previous game round." In a meeting which Karcher did not attend, Taylor and Wors explained that an employee who suffered an on-the-job injury but did not lose work time as a result thereof would be permitted to play the game if the employee reported the injury to his supervisor.

In January 1994, Karcher visited a doctor for treatment of the recurrence of a work injury that she had suffered on July 14, 1993, and which she had reported to her supervisor at the time. On January 10, 1994, Karcher filed a workers' compensation claim for this doctor visit. Karcher lost no work time in relation to this visit, and she did not report the claim to her supervisor. On January 20, Karcher's supervisor presented the bingo sign-in sheet for Karcher to sign. When Karcher declined to sign it, she was informed that participation in the game was mandatory. Karcher therefore signed the form. The language explaining that

an employee who suffered any work-related injury was not permitted to sign the form was obscured by the top of the clipboard. Karcher was subsequently issued a disciplinary warning for falsification of company records for signing of the bingo form without reporting an injury to her supervisor. The notice warned that any further infractions could result in discharge. Karcher filed a grievance over this report, and it was eventually removed from her file, although the warning remained in effect for most of the remainder of 1994.

On October 24, 1994, Karcher filed this complaint against Emerson, alleging discrimination on the basis of her sex and handicap, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat § 213.111. She alleged four incidents of discrimination: a) two incidents of failure to promote to Group 6 set-up positions based on her sex and b) two incidents of retaliation for her filing charges with the EEOC and the Missouri Commission on Human Rights: threatening to fire her husband and forcing him to leave the company and disciplining and threatening to discharge her with respect to the bingo game.

The jury returned a verdict for Karcher, awarding her $25,000 for lost wages and benefits, $150,000 for emotional pain and suffering, and $350,000 in punitive damages. Emerson filed a motion for judgment notwithstanding the verdict, for a new trial, and to amend the judgment, which the district court denied.

II.

Emerson first claims that it was entitled to JAML on Karcher's claims of failure to promote. We review de novo a district court's denial of a motion for JAML, applying the same standard as the district court and overturning the verdict only if the evidence, viewed in the light most favorable to the nonmoving party, is

insufficient to support the verdict. *Nicks v. State*, 67 F.3d 699, 704 (8th Cir. 1995).

Emerson attacks the verdict regarding Karcher's failure-to-promote claims on two fronts, first arguing that Karcher failed to establish a prima facie case of sex discrimination, and then arguing that Karcher failed to prove that Emerson's proffered legitimate rationale for its actions was pretextual.[2] We decline to re-engage in the three-step analysis performed by the district court, but instead limit our review to the ultimate factual issue of whether Emerson intentionally discriminated on the basis of the Karcher's sex. *See Parrish v. Immanuel Medical Ctr.*, No. 95-3514, slip op. at 8 n.2 (8th Cir. Aug. 14, 1996); *Winbush v. State of Iowa by Glenwood State Hosp.*, 66 F.3d 1471, 1479-80 (8th Cir. 1995); *Polacco v. Curators of the Univ. of Mo.*, 37 F.3d 366, 369-70 (8th Cir. 1994); *Nelson v. Boatmen's Bancshares. Inc.*, 26 F.3d 796, 800-01 (8th Cir. 1994).

To determine the merit of Karcher's discriminatory failure-to-promote claims, the jury was required to accept either Emerson's explanation that it failed to promote Karcher because she was not qualified or Karcher's claim that Emerson failed to promote her because she was a woman. This determination involved an evaluation of lengthy testimony concerning the company's promotion policies and the qualifications necessary to operate the new computerized equipment.

Emerson attempts to portray the selection process for the Group 6 set-up positions as thoroughly consistent, pointing to

---

[2] In a disparate treatment employment discrimination case, the plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination. The burden of production then shifts to the defendant to set forth legitimate reasons for his actions. Finally, if the defendant carries this burden, the plaintiff assumes the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. *Hicks v. St. Mary's Honor Ctr.*, 509 U.S 502 (1993); *Nelson v. Boatman's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994).

Grady Scott as the single example of an employee who was hired without experience either on machine setup or on the numerically-controlled machines. The testimony at trial, however, paints a more ambiguous picture of the selection process. For example, Frank Carter was initially found not qualified for a Miyano job. When he complained to his brother, John Carter, who was the general foreman in the machine shop, he was given the job. In addition, two other male employees were first told that they were not qualified, and then shortly thereafter were deemed to be qualified and given the job.

Moreover, the jury heard evidence from which it could have inferred discriminatory intent on Emerson's part. For example, more than six years after Emerson adopted procedures to choose people for this job, it still had not given any women the experience allegedly necessary to qualify for the job. In addition, from the time Richard Blair, the foreman responsible for choosing several of the disputed positions, was hired in 1986, until the time of trial, no women worked in his department.

We find that the jury reasonably could have inferred from the inconsistent nature of Emerson's selection process and Emerson's failure to select any women or to train women to meet the alleged qualifications of the job that Emerson intentionally discriminated by failing to promote Karcher to a Group 6 set-up position because of her sex. Thus, the evidence supporting a finding of intentional discrimination was sufficient to support the verdict on the failure-to-promote claims.

III.

Emerson claims that it was entitled to JAML on Karcher's retaliation claims. Emerson argues that Karcher lacked standing to assert the rights of her husband and that she failed to state a claim upon which relief could be granted.

To meet the constitutional requirements of standing, a plaintiff "must allege personal injury fairly traceable to the defendant's

allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The evidence, viewed in Karcher's favor, supports a finding that Emerson's dismissal of her husband caused Karcher to suffer both economic and emotional damage. Although her husband received a higher paying job, the job offered him (and thus her) fewer benefits. Moreover, Karcher testified that she felt responsible for causing her husband to leave a job that he liked and that this caused her emotional stress and placed an additional strain on her marriage. The testimony of her psychiatrist and psychologist corroborated Karcher's claims of emotional distress.

Emerson relies on *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994), and *Parsons v. County of Del Norte*, 728 F.2d 1234 (9th Cir.) (per curiam), *cert. denied*, 469 U.S. 846 (1984), for the proposition that it had an unequivocal right to dismiss Karcher's husband when a conflict of interest arose in relation to Karcher's grievances and workers' compensation claims. We find these cited cases to be inapposite, for they involved the question whether a governmental interest in avoiding conflicts of interest outweighs an employee's constitutional right to intimate association. The employees who suffered adverse employment action in those cases did not attribute that action to an impermissible retaliatory motive. Rather, the employees argued that the employers' articulated motive of avoiding a conflict of interest was outweighed by the employees' constitutional right to be married. Thus, the credibility of the employers' explanation was not at issue.

In contrast, Emerson's true motivation was the primary issue to be resolved at trial. Karcher claimed that Emerson's motivation was retaliatory; Emerson claimed that it was motivated purely by the desire to avoid an emerging conflict of interest. The jury heard sufficient evidence from which it could have believed Karcher and disbelieved Emerson.

Emerson also argues that it was entitled to JAML on Karcher's claim that the company retaliated against her by issuing a written warning with respect to the bingo game. The jury heard evidence that Karcher was forced to sign the form, that the warning instructing employees with work-related injuries not to sign the form was concealed at the time Karcher signed it, and that Karcher's injury had not occurred within the relevant six-month period. In light of this evidence, the jury could have inferred that the disciplinary action taken by the company was taken in retaliation for Karcher's grievances and claims against the company.

IV.

Emerson argues that the trial court erred in instructing the jury on Karcher's claim for damages for emotional distress, contending that the instruction was not supported by the evidence, was not limited to the employment practices complained of, and did not require adequate proof of causation. We reject these arguments. In particular, we note that in addition to Karcher's testimony, the testimony of Dr. John Canale, Karcher's treating psychiatrist, and that of Dr. Shirley Salmon, her treating psychologist, tied Karcher's depression and emotional stress to her job-related problems.

We also reject Emerson's claim that Karcher's recovery of emotional distress damages is barred by the Missouri workers' compensation statute. The exclusivity provision of the Missouri workers' compensation statute provides that:

> The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee . . . at common law or otherwise, on account of such accidental injury as death, except such rights and remedies as are not provided for by this chapter. Mo. Rev. Stat. § 287.120.2.

Clearly, this exclusivity provision can not preempt Karcher's federally created right to recover damages for emotional distress under Title VII. Moreover, we decline to read the provision to bar the recovery of such damages under the MHRA absent clear direction from the Missouri courts, and we have found no such direction.

Although Missouri courts have held that the exclusivity provision bars common law tort actions that arise out of incidents covered by the workers' compensation statute, *see, e.g., Hill v. John Chezik Imports*, 797 S.W.2d 528, 531 (Mo. Ct. App. 1990), they have not extended the exclusivity provision to bar suits under the MHRA. Indeed, the language of the MHRA appears to preclude any such finding. The statute states, in relevant part, that:

> The provisions of this chapter shall be construed to accomplish the purposes thereof and any law inconsistent with any provision of this chapter shall not apply.

We interpret broadly the remedial purpose of the MHRA, and we conclude that an award of emotional damages under the statute is not foreclosed by the possibility that such damages would have been recoverable under the workers' compensation statute.

We agree with Emerson that the punitive damages claim should not have been submitted to the jury, for there was simply insufficient evidence that Emerson acted "with malice or reckless indifference to [Karcher's] federally protected rights," as required under Title VII, or that Emerson's conduct was outrageous as required under the MHRA. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993) (standard under Missouri law); 42 U.S.C. § 1981a(b)(1) (standard under federal law). To support her punitive damages claim with respect to the failure-to-promote claims, Karcher relies on Emerson's alleged deliberate choice to set qualifications that would effectively eliminate all women from obtaining Group 6 set-up

positions. Moreover, Karcher argues that the retaliatory actions taken by Emerson justify a punitive damages award.

This evidence does not support a finding either that Emerson acted with malice or deliberate indifference or that its conduct was outrageous. *See Nelson*, 26 F.3d at 804 (To recover punitive damages, Missouri law requires a showing of conduct that would "shock the conscience and cause outrage"); *Turic v. Holland Hospitality. Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (duplicitous actions of employees were insufficient to support punitive damages award under Civil Rights Act of 1991); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (a showing of more than intentional discrimination is required to recover punitive damages under Civil Rights Act of 1991). Accordingly, the punitive damages award must be set aside.

V.

We address the remainder of Emerson's claims only briefly. Emerson's contention that Karcher was not entitled to a jury trial on her MHRA claims is foreclosed by our recent decision in *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 231 (8th Cir. 1996). We have examined each of Emerson's claims of evidentiary error, and find them to be without merit. *See Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 134 (8th Cir. 1985) (trial judge has broad discretion regarding the admissibility of evidence).

With respect to Emerson's claims of error relating to the jury instructions, we review the district court's jury instructions for abuse of discretion and on review must determine simply "whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *Sherbert v. Alcan Aluminum Corp.*, 66 F.3d 965, 968 (8th Cir. 1995). We find some merit in two of Emerson's jury instruction claims. First, we agree that the instructions should have included a specific provision on intent. Second, the instructions should have included a specific instruc-

tion on the requirement that plaintiff be qualified for the applied-for positions. Proof of both intent to discriminate and qualification for the applied-for positions is necessary under a disparate treatment theory of sex discrimination. *See Marzec v. Marsh*, 990 F.2d 393, 395 (8th Cir. 1993).

In this case, however, we do not believe that Emerson was prejudiced by the district court's failure to instruct specifically on intent or qualifications. *See Stemmons v. Missouri Dep't of Corrections*, 82 F.3d 817, 820 (8th Cir. 1996). The jury was instructed that to return a verdict for Karcher, it must find that "plaintiff's sex was a motivating factor in defendant's decision." This instruction was sufficient to convey to the jury that unless Emerson's actions were intentional, Karcher could not recover. As to the qualifications issue, Emerson argued in closing that it failed to promote Karcher because she was not qualified. From the instructions given, if the jury believed Emerson that its true reason for failing to promote Karcher was her lack of qualifications for the job, then the jury could not find for Karcher. Thus, Emerson suffered no prejudice from the absence of more detailed instructions, and we find no reversible error. Emerson's challenge to the instruction on Karcher's retaliation claim must likewise be rejected.

That portion of the judgment awarding compensatory damages is affirmed. That portion of the judgment awarding punitive damages is reversed, and the case is remanded to the district court for entry of judgment dismissing that portion of Karcher's complaint.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3427EMSL

Karen M. Karcher,
Appellee,

vs.

Emerson Electric Co.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

AMENDED ORDER

The suggestions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Loken took no part in the consideration or decision of this case.

November 13, 1996

Order Entered at the Direction of the Court
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAR 20 1997
CLERK

No. 96-1304

In The

Supreme Court of the United States

October Term, 1996

KAREN KARCHER,

Petitioner,

vs.

EMERSON ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

D. MICHAEL LINIHAN
Counsel of Record
ROBERT W. STEWART
MICHELLE M. CAIN
McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
Attorneys for Respondent
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314) 567-7350

70808 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

23 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eighth Circuit erred when it determined that Petitioner had failed at trial to demonstrate that Respondent acted with malice or reckless indifference to her federally protected rights such that an award of punitive damages under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, was improper.

RULE 29.6 STATEMENT

Respondent Emerson Electric Company, defendant below, has no parent corporation. Its nonwholly owned domestic subsidiaries are Vermont America Corporation and McGill Manufacturing Company.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	7
Conclusion	17

TABLE OF CITATIONS

Cases Cited:

Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994) 8

BMW of North America, Inc. v. Gore, __ U.S. __, 116 S. Ct. 1589 (1996) 12, 14

Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d 627 (7th Cir. 1996) 8, 14

Hennessy v. Penril Datacomm Networks Inc., 69 F.3d 1344 (7th Cir. 1995) 8, 14

Kimzey v. Wal-Mart Stores, Inc., __ F.3d __, 1997 WL 68196 (8th Cir. Feb. 20, 1997) 8

Contents

Page

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 15

McKinnon v. Kwong Wah Restaurant, 83 F.3d 498 (1st Cir. 1996) 8

Merriweather v. Family Dollar Stores of Indiana, 103 F.3d 576 (7th Cir. 1996) 8, 9, 13

Nolte v. Pearson, 994 F.2d 1311 (8th Cir. 1993) 4

Ortiz v. John O. Butler Co., 94 F.3d 1121 (7th Cir. 1996) 8, 15

Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996) 14

Philadelphia W. & B. R. Co. v. Quigley, 62 U.S. (21 How.) 202 (1858) 11

Smith v. Wade, 461 U.S. 30 (1983) 11, 12, 13, 14

Splunge v. Shoney's Inc., 97 F.3d 488 (11th Cir. 1996) 14

Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1995) 8

United States v. Warden, 676 F.2d 252 (7th Cir. 1982) 4

Contents

	Page
Varner v. National Super Markets, Inc., 94 F.3d 1209 (8th Cir. 1996)	8

Statutes Cited:

42 U.S.C. § 1981	14, 15
42 U.S.C. § 1981a(a)(1)	9
42 U.S.C. § 1981a(b)(1)	8, 9
42 U.S.C. § 1981a(b)(3)(D)	16
42 U.S.C. § 1983	11, 12
42 U.S.C. § 2000e *et seq.*	i, 1
Mo. Rev. Stat § 213 *et seq.*	1

Other Authorities Cited:

H.R. Rep. No. 40, 102nd Cong., 1st Sess. (1991)	10
H.R. Rep. No. 40(I), 102nd Cong., 1st Sess. (1991)	10
Restatement (Second) of Torts § 908(2) (1977)	11

STATEMENT OF THE CASE

Petitioner Karen Karcher ("Petitioner" or "Karcher") filed a complaint on November 2, 1992, against her employer, Alco Controls ("Alco"), a division of Respondent Emerson Electric Company ("Emerson"), for alleged violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17 and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213 *et seq.* In her complaint, Karcher alleged that she had been denied two promotions because of her sex and had been retaliated against for filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), in violation of Title VII and the MHRA.

Karcher had worked at Alco, a manufacturer of refrigeration parts, since 1976 and was still employed at Alco as of the date of trial. At the time of trial, Karcher was a Group 2 machine operator. Her husband, Jerry Karcher, also worked at Alco as a quality assurance supervisor.

Alco employed both machine operators and set-up workers in its machine shop. Those who "set up" the equipment initially prepared the stations and set up the tools within the machines so that the equipment would produce a specific part. The set-up person then maintained the tooling when the machine malfunctioned or the tooling became dull during operation. After the equipment was set up, the operator was responsible for actually operating the machine and maintaining the quality of the parts, while the set-up worker repaired any malfunctioning parts.

Alco's machine shop utilized several different types of machinery, including "bar feed" equipment and "automatic chucker" equipment. Both the bar feed and the automatic chucker machinery were manually set up. In 1988, Alco

purchased four new bar feed and automatic chucker machines, costing between $95,0000 and $98,000 each. The new equipment was operated in the same way as the old machinery, except that the new machines were set up through the use of computers while the old were still set up by hand.

When the new machinery was put into operation in 1988, pursuant to the requirements of its collective bargaining agreement, the company met with the union representing its workers to determine the job classification, pay rate and qualifications necessary to award the new set-up jobs for the equipment. The evidence at trial was undisputed that Alco and the union eventually agreed that set-up jobs on the new equipment would be classified as "Group 6 General Machine Shop Set-Up" [hereinafter "Group 6 Set-Up"]. The collective bargaining agreement also provided that when job openings at the facility were available, a listing would be posted, and "[t]he job opening will be filled with seniority being the deciding factor, where skill, ability and physical fitness of the employees' [sic] being considered are relatively equal." Six of seven witnesses at trial testified that the union and the company agreed that, at least after the first six months the new equipment was operating, the "skill and ability" required by the collective bargaining agreement for the set up jobs on the new equipment would be determined by prior set up experience on the machines being replaced.[1] The company and the union agreed that the senior bidder with prior set-up experience on the appropriate equipment would be awarded the position. No employees were trained for these positions and those who were awarded the positions were also required to manually set up the old machines, which were still in operation.

---

1. The only witness who testified differently was Grady Scott, Karen Karcher's stepfather. Scott stated that it was his understanding that the agreement was that the new positions would be awarded based solely on seniority.

The evidence at trial was clear and uncontradicted that the agreement with the union was followed on twenty-six occasions between 1988 and 1994. The evidence was also undisputed that of the twenty-six Group 6 Set-Up awarded between 1988 and 1994, the successful bidder on twenty-five of those awards had set-up experience on analogous equipment at Alco.[2] The union's representative testified at trial that in awarding these twenty-six job bids, Emerson had never violated the collective bargaining agreement.

Karen Karcher twice bid on Group 6 Set-Up positions, although her only machine shop experience at Alco was working as an *operator*.[3] By her own admission, she had never held a set-up position. Karcher was denied both positions, as were male employees who had more seniority than Karcher but who also lacked set-up experience. Karcher admitted at trial that she told the company she should have been awarded the second job bid based solely on seniority. She also admitted at trial that the employees chosen for the two positions had set up experience, that she had never worked in a set up position and that the male employee awarded the 1992 Group 6 Set-Up position had better qualifications than she did.[4]

---

2. Again, the only exception was Grady Scott, Karen Karcher's stepfather, who told the company that he had set up experience at this own machine shop.

3. Petitioner's contention in her Petition that she applied for Group 6 positions "on numerous occasions" in a misstatement. (Petition, at 2). The only alleged discriminatory denials of Group 6 Set-Up positions at issue in this case occurred in 1990 and 1992, *twice*, not "on numerous occasions."

4. Petitioner asserts that "in the six years *after* the prerequisite was established — up to the trial of this lawsuit — the company continued to exclude women from manual set up jobs, so none could become 'eligible' for a Group 6 set up promotion." (Petition, at 3). Contrary to Petitioner's (Cont'd)

After each denial of her bids for the Group 6 Set-Up positions, Karcher filed a grievance with her union. The union refused to process the first grievance to arbitration because of lack of merit. It also withdrew the second grievance. Karcher also filed charges of discrimination with the EEOC and the Missouri Commission on Human Rights ("MCHR") after the bid denials, alleging that she had been denied the positions because of a handicap and because of her sex.

Karcher also filed at least six workers' compensation claims for injuries she contended she received while working at Alco beginning on March 30, 1983 through January 10, 1994. Karcher admitted at trial that she attempted to discuss her workers' compensation claims and on-the-job injuries with her husband, Jerry Karcher, while he was employed at Alco as a quality assurance supervisor. Jerry Karcher testified at trial that his wife talked to him about her various claims against the company. He

---

(Cont'd)
assertions, however, there was no evidence admitted at trial on the promotion or lack thereof of any woman, including Karcher, to manual set up positions below Group 6. In fact, all such evidence was specifically excluded by the trial court. Petitioner did not appeal the trial court's ruling but nevertheless argued on appeal this same theory, admitting that the evidence had been excluded. Emerson argued below that all such evidence was improperly before the court of appeals because Karcher had waived allegations of error in the trial court's ruling by failing to appeal it. The Eighth Circuit made no specific ruling on this issue but appears to have relied in part on this evidence in concluding that Emerson was not entitled to judgment as a matter of law: "[T]he jury heard evidence from which it could have inferred discriminatory intent on Emerson's part. For example, more than six years after Emerson adopted procedures to choose people for this job, it still had not given any women the experience necessary to qualify her for the job." (Appendix to Petition for Writ of Certiorari [hereinafter "Pet. App."], at A-9). This evidence was not admitted at trial, was not before the jury, was not properly before the court of appeals and is not properly before this Court. *See Nolte v. Pearson*, 994 F.2d 1311, 1314 (8th Cir. 1993); *United States v. Warden*, 676 F.2d 252 (7th Cir. 1982).

also testified that he attended monthly supervisor's meetings, at which status reports were presented regarding pending workers' compensation claims and grievances, including those of his wife. Other witnesses testified at trial that the information discussed at these meetings included the company's position on Karcher's grievances, the amount of money available for particular workers' compensation injuries, the possibility of settlement for workers' compensation injuries, and the company's position with respect to individual charges pending before the EEOC or MCHR.

In early 1990, after Karen Karcher applied for a job in the quality assurance department, Jerry Karcher told his superiors that if his wife were awarded the job, there would be a conflict and he would leave the company. Jerry Karcher also told them that if there ever was a conflict of interest with his wife's position and his own, he would resign. When Karen Karcher was told during her testing for the position that her husband would leave the company if she were awarded the position, she left the test without completing it and was no longer considered for the job. In 1989, Jerry Karcher began looking for another job because he believed he was not being paid enough for the hours he was working.

In early December of 1991, Karen Karcher learned that a Group 6 Set-Up position would become available because her stepfather, Grady Scott, who had been awarded the position, told her he was retiring. Karcher then attempted to contact the president of Alco about the potential job opening by going to his office and asking to speak with him. Karcher was told to go through the appropriate channels to bid for the position.

On December 9, 1991, Jerry Karcher's superiors held a meeting with him at which they told him about his wife's attempt

to meet with the president. They also stated that they believed a serious conflict of interest had developed and that they would take him up on his previous offer to resign from the company when a conflict of interest arose. They told him that he should take the next sixty days to begin looking for another job and that the company would help him with his job search. Jerry Karcher was not told he was being terminated and, at a later meeting, he was specifically told he was not being forced to resign. Jerry Karcher did not find another job within sixty days, but continued to work at Alco. In July of 1992, eight months after the meeting, Jerry Karcher was offered a job at another company for a higher salary and left Alco at that time to take the position.

In January of 1994, Karen Karcher was issued a disciplinary warning for falsifying company records when she signed a company bingo game sheet which stated that she had not had any work-related injuries in the prior game round. Karcher grieved the discipline and it was ultimately removed from her file.

While still employed at Alco, in November of 1992, Karcher filed a lawsuit against Emerson, alleging that she had been discriminated against because of her sex and handicap and retaliated against for complaining of discrimination. After amending her complaint three times, Karcher ultimately alleged that Emerson had discriminated against her on the basis of her sex by twice failing to promote her to the Group 6 Set-Up position and had retaliated against her for filing a charge of discrimination by issuing her the discipline for the bingo game and by telling her husband to find another job. The case proceeded to trial on Karcher's two claims of disparate treatment and two claims of retaliation.[5] The jury returned a verdict for

5. Karcher's Title VII claim of promotion denial in 1990 was tried to the court; her other claims under Title VII and the MHRA were tried to a jury.

Karcher on each of her claims. It awarded her $25,000 for lost wages and benefits, $150,000 in emotional damages and $350,000 in punitive damages. The trial court denied Emerson's motion for judgment notwithstanding the verdict, for a new trial and/or to alter or amend judgment.

The Eighth Circuit Court of Appeals upheld the jury's award for lost wages, benefits and compensatory damages, even though it also concluded that the trial court's instructions to the jury were erroneous. It also held that Karcher had not proven that Emerson acted with malice or reckless indifference to her rights, the standard for the award of punitive damages under Title VII, or that Emerson's conduct was outrageous, the standard for the award of punitive damages under the MHRA. It set aside the jury's award of $350,000 in punitive damages. (Pet. App. A-13).

REASONS FOR DENYING THE WRIT

In her petition, Karcher urges this Court to abandon long established and well-settled principles regarding the imposition of punitive damages and to ignore the plain language of the 1991 amendments to Title VII. Petitioner's assertions that there is confusion in the lower courts about the proper punitive damage standard to apply in Title VII cases is untenable, as is her novel and legally unsupportable proposition that a district court should have no discretion in submitting the issue of punitive damages to the jury once it has determined that the defendant is not entitled to judgment as a matter of law. Quite simply, there is nothing about this case in the Petition which merits review by this Court, either because of disagreement among the circuit courts of appeals or because an important issue of federal law needs to be resolved.

Contrary to Petitioner's contentions, there is no dispute among the circuit courts of appeals on the standard necessary

for the imposition of punitive damages in disparate treatment claims under Title VII. The federal appellate courts, including the court below in this case, have applied the same uniform standard for the imposition of such damages; that is, the standard set forth in the 1991 amendments to Title VII: punitive damages may be awarded "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved employee." 42 U.S.C. § 1981a(b)(1). *See Kimzey v. Wal-Mart Stores, Inc.*, __ F.3d __, 1997 WL 68196 (8th Cir. Feb. 20, 1997); *Merriweather v. Family Dollar Stores of Indiana*, 103 F.3d 576 (7th Cir. 1996); *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 636 (7th Cir. 1996); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996); *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1126 (7th Cir. 1996); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1995); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 506 (1st Cir. 1996); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995); *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994).

Petitioner contends that some courts require an "extra showing," aside from evidence of intent to discriminate, to submit a punitive damage case to a jury on the grounds of malice or reckless indifference, while others do not. She can point to only one case, however, *Merriweather*, as evidence of disagreement among the courts of appeals in Title VII cases on this issue. In fact, *Merriweather* was a bench trial and did not involve the imposition of punitive damages by a jury. 103 F.3d at 576. The court decided punitive damages were appropriate because the trial court as a factfinder concluded that the defendant's conduct exhibited "reckless indifference" to the plaintiff's civil rights. *Id.* at 581. Although the court stated in dicta that "evidence that suffices to establish an intentional

violation *may* also suffice to permit the [factfinder] to award punitive damages," this statement was made in response to the defendant's argument that *direct* evidence of knowledge of the violation of the plaintiff's rights was necessary to impose punitive damages. *Id.* at 581 (emphasis added). The court did not hold that *all* findings of intentional discrimination were the equivalent of reckless or malicious conduct, or that the trial court *must* permit the jury to determine if punitive damages should be imposed in all cases in which judgment as a matter of law has been denied, as Petitioner contends. Nor did it state that "the standard for punitive damages in Title VII cases is the same as the underlying standard for liability," as Petitioner also argues. (Petition, at 11). It merely held that direct evidence of knowledge of the violation of rights is *not* necessary and that, in some cases, the same evidence which establishes liability *may* also establish reckless disregard for the plaintiff's rights. *Merriweather* is thus not fundamentally at odds with the other federal courts which have held that maliciousness or reckless conduct requires more than a showing of intentional discrimination.

The crux of Petitioner's argument is that intentional discrimination is *per se* malicious or reckless conduct under Title VII. Such a proposition finds no support in *any* federal case law or in the statute and is certainly not an important and unresolved question of federal law that this Court need resolve. The 1991 amendments to Title VII permit the award of both compensatory and punitive damages, but differentiate between them. Compensatory damages may be awarded "against a respondent who engages in unlawful intentional discrimination," 42 U.S.C. § 1981a(a)(1), but punitive damages may be awarded only if "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Clearly, the drafters of the amendment did not

equate *all* intentional discrimination with malicious or reckless behavior. Nor did they intend to provide punitive damages for all intentional discrimination. Had they so intended, the statute would have stated that punitive damages were available for intentional discrimination and would *not* have restricted recovery to cases where the complaining party demonstrated malicious or reckless behavior. Presumably, Congress said what it meant and meant what it said. Petitioner's argument is belied by the very statute under which she sought relief. This Court need look no further than the plain language of the statute to see the fallacy in Petitioner's position.

Even if it were necessary to examine the legislative history of the 1991 amendments, that history makes clear that the statute requires a higher standard of culpability for the award of punitive damages than that required for the award of compensatory damages. The House of Representatives Committee on the Judiciary's Majority Report stated that the intent of the amendment was to provide "victims of intentional discrimination the right to recover compensatory damages, and, *in egregious cases*, punitive damages as well." H.R. Rep. No. 40, 102nd Cong., 1st Sess., pt. 2, at 3 (1991) (emphasis added). The House Report also stated, "Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, and *must meet an even higher standard* (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages." H.R. Rep. No. 40(I), 102nd Cong., 1st Sess. at 72 (1991) (emphasis added). This "higher standard" is the one utilized by *all* federal courts on this issue, including the court below.

Indeed, in this country, a showing of egregious behavior — whether it is termed "malice," "willfulness," "wantonness" or "recklessness" — has traditionally been required under the

common law to impose punitive damages, even for intentional torts, for over one hundred years. *See Smith v. Wade,* 461 U.S. 30, 38-48 (1983), and cases cited therein. In *Philadelphia, W. & B. R. Co. v. Quigley,* 62 U.S. (21 How.) 202, 214 (1858), this Court noted:

> Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignation, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act.

See also Restatement (Second) of Torts § 908(2) (1977) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others"). Petitioner offers no valid reason to depart from his long-standing rule.

As support for her argument, Petitioner relies on statements in the legislative history of the 1991 amendments that the standard for the imposition of punitive damages under Section 1981a was meant to be that set forth by this Court in *Smith v. Wade,* 461 U.S. 30 (1983), for punitive damages under 42 U.S.C. § 1983. Nothing in this Court's holding in *Smith,* however, demonstrates that punitive damages may be imposed under the 1991 amendments for anything other than reckless or malicious conduct. In *Smith,* the underlying liability was premised on reckless conduct — "gross negligence" or "egregious failure to protect" the plaintiff — because the plaintiff's action was a Section 1983 claim against a public official and because qualified immunity was applicable. 461 U.S. at 32. The Court simply held that no further showing, aside from the "reckless or callous

disregard for the plaintiff's rights" was necessary for a finding of underlying liability. *Id.* at 51. The Court also noted, however, that "it is not entirely accurate that punitive and compensatory damages were awarded in this case on the same standard." *Id.* at 52.

In Title VII cases, however, because no issues of qualified immunity normally are present, underlying liability is not established by "reckless or callous disregard for the plaintiff's rights." Rather that liability is premised on intentional discrimination. The reckless or malicious conduct required in *Smith* for Section 1983 claims is a higher standard that the imposition of underlying liability in Title VII claims. Applying the *Smith* standard to Title VII claims for punitive damages still requires a showing of reckless or malicious behavior, as clearly the drafters of the 1991 amendments intended. This punitive damage standard in Title VII cases is the same as that in *Smith,* but because the underlying liability standard is not the same, but lower in Title VII cases, a showing of recklessness or maliciousness requires more in a Title VII case than a showing of the underlying liability. Thus, there is no inconsistency between the statute's tracking of the "reckless disregard" language of *Smith* with the notion that punitive damages under Title VII require more than proof of intentional discrimination.

Petitioner's argument that a finding of a violation of Title VII is the legal equivalent of malicious or reckless conduct is unsupportable. Equally unsupportable are her contentions that once the trial court denies a motion for judgment as a matter of law, it *must* submit the issue of punitive damages to the jury and that jury's award is unreviewable unless it is so grossly excessive that it violates the standards of constitutional due process set forth by this Court in *BMW of North America, Inc. v. Gore,* __ U.S. __, 116 S. Ct. 1589 (1996). (*See* Petition, at 15). Petitioner

can cite to no legal authority, aside from erroneous reliance on *Merriweather,* for this novel proposition and, indeed, there is none. Petitioner would have this Court take away the trial court's discretionary ability to determine if a factual issue exists for jury resolution.[6] Not a single case cited by Petitioner, including *Merriweather* and *Smith,* stands for this proposition. In *Smith,* this Court at least implied that the trial court must make an initial determination that a question of fact exists as to whether the evidence demonstrates a reckless or callous disregard for the plaintiff's rights "sufficient to trigger a jury's consideration of the appropriateness of punitive damages." 461 U.S. at 50. And, like the petitioner's argument in *Smith,* Karcher's argument "overlooks a key feature of punitive damages — that they are never awarded as of right, no matter how egregious the defendant's conduct." *Id.* at 52.

Petitioner's argument is also premised on the faulty notion that there are no different degrees of culpability in disparate treatment cases, that is, that one instance of disparate treatment can be no more egregious than another. Petitioner would have all acts of disparate treatment by their nature deemed malicious and reckless, thus making the imposition of punitive damages appropriate in *all* cases of discrimination. (Petition, at 11). According to Petitioner's theory, quid pro quo sexual harassment would be no more malicious than the denial of a promotion. Also under her theory, a hostile working environment in which an employee is subjected to daily and repeated verbal abuse, threats, intimidation or unwanted physical conduct is no more culpable than an employee being disciplined and having that discipline later removed from the personnel file. Similarly, a

---

6. Because trial courts have the discretion to determine initially whether there is sufficient evidence to go to a jury on underlying liability, there is no cogent reason they should not have the same ability to determine whether the standards necessary for the possible imposition of punitive damages have been met.

corporate policy which specifically states that a company prefers to hire younger workers and the implementation of that policy throughout the country would be no more egregious than a refusal to transfer one employee based on age. Such a theory flies in the face of the language of the statute itself, its legislative history and case law interpreting it.

In fact, this Court has long recognized that there *are* differences in degrees of culpability. *Smith*, 461 U.S. at 37-48; *Gore*, __ U.S. at __, 116 S. Ct. at 1598-99. In *Gore*, this Court held that one of the factors to be considered in determining the appropriateness of punitive damages for constitutional purposes was the degree of reprehensibility of the defendant's conduct. *Id.* Similarly, the federal courts of appeals, within the framework of Title VII, have developed guidelines — a "hierarchy of possible civil rights violations" — to determine what conduct indicates malice or reckless disregard for the rights of an employee and what does not. *Emmel*, 95 F.3d at 637. For example, the courts have held that corporate management's knowledge of or participation in harassment or disparate treatment is a determining factor in analyzing whether the defendant had the requisite malicious intent to discriminate. *Splunge v. Shoney's Inc.*, 97 F.3d 488, 490 (11th Cir. 1996) (no showing that the corporate hierarchy actually knew of lower level employee's harassment of another justified no award of punitive damages); *Emmel*, 95 F.3d at 636 (owner's policy of discriminating against women in upper management positions justified imposition of punitive damages); *cf. Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (discriminatory acts of lower level employee not imputed to defendant employer for purposes of imposition of punitive damages under 42 U.S.C. § 1981). Courts have also held that quid pro quo sexual harassment is by its nature more egregious than other types of disparate treatment. *Hennessy*, 69 F.3d at 1355; *Emmel*, 95 F.3d at 637. They have also held that a

defendant's good faith belief that it was justified in disciplining an employee did not demonstrate that the defendant's state of mind was malicious or that its actions were taken in reckless indifference to the plaintiff's federally protected rights. *Ortiz*, 94 F.3d at 1126. Petitioner's theory that one act of discrimination is the same as another is one clearly rejected by the federal appellate courts.

These cases also demonstrate unequivocally that there is neither confusion nor disagreement in the federal courts of appeals on the issue of the appropriate standard to apply to claims for punitive damages under Title VII. The availability of punitive damages is determined on a case-by-case basis, but there are clearly parameters for imposition of those damages, parameters the Eighth Circuit correctly applied in this case. The rampant chaos among the lower courts on this issue alleged by Petitioner simply does not exist. If, as Petitioner contends, the circuit courts of appeals are in disagreement over the correct punitive damage standard to apply in Section 1981 cases, this case, based on Title VII claims, is not an appropriate vehicle to review such standards or to clarify any misapplication that may exist.

In this case, the Eighth Circuit, as had every other federal appellate court before it, applied the standard set forth in the 1991 amendments to the Civil Rights Act to determine whether a submissible case for punitive damages had been established under both Title VII and the Missouri Human Rights Act. Emerson had denied Petitioner one job bid,[7] had issued her one disciplinary warning which was removed from her file and had

---

7. Punitive damages could not as a matter of law under Title VII have been awarded on the job bid denial in 1990 because it occurred prior to the enactment of the 1991 amendments to Title VII. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

told her husband that a conflict of interest had developed and that he should look for another job. The Eighth Circuit concluded, based on this less than egregious conduct, that Karcher failed to demonstrate the requisite malice or recklessness on the part of Emerson and also failed to demonstrate "outrageousness," as required by the MHRA. Contrary to Petitioner's assertions, the court did *not* hold that some additional evidence was necessary for the imposition of punitive damages; it merely held that the evidence at trial demonstrated no maliciousness or outrageousness in Emerson's conduct. The court of appeals' decision on the issue of punitive damages is totally compatible with the decisions of the federal courts of appeals issued both before and after its opinion, the plain language of the statute itself and the legislative history of the 1991 amendments to Title VII. Simply because Petitioner believes its analysis was too short does not justify this Court's review of its decision.

Moreover, at least part of the Eighth Circuit's rejection of the punitive damage award must necessarily have rested on its interpretation of Missouri law. The amount of punitive damages awarded by the jury — $350,000 — was well above the limitation placed on such damages by the 1991 amendments, particularly when added to the compensatory damages of $150,000 also awarded. 42 U.S.C. § 1981a(b)(3)(D). Missouri has not placed caps on compensatory and punitive recovery under the MHRA and thus the district court did not reduce the verdict, because it was premised on both federal and Missouri law. In fact, the jury was instructed on the standards for punitive damages under both Title VII and the MHRA. Consequently, any decision of the Eighth Circuit involved application not only of the Title VII standard for punitive damages, but also considered requirements under Missouri law for imposition of punitive damages. Should this Court decide that the issue of the punitive damage standard under Title VII needs clarification,

the Eighth Circuit's decision in this case is not the best choice for review, based as it was on state as well as federal law.

CONCLUSION

Petitioner has presented this Court with no cognizable reason to review the Eighth Circuit's decision. There is no confusion among the lower courts on the appropriate standard for imposition of punitive damages under Title VII and the Eighth Circuit followed that standard to the letter in this case. Nor is there an important question of federal law which needs this Court's clarification. The language of the statute and its legislative history amply demonstrate that a higher level of culpability is necessary for the imposition of punitive damages under the 1991 amendments to the Civil Rights Act than that necessary to award compensatory damages. Nothing in the Eighth Circuit's opinion is inconsistent with that view or warrants review by this Court.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

D. MICHAEL LINIHAN
Counsel of Record
ROBERT W. STEWART
MICHELLE M. CAIN
McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
Attorneys for Respondent
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314) 567-7350